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3
4 **UNITED STATES DISTRICT COURT**
5 **DISTRICT OF NEVADA**
6

7 UNITED STATES OF AMERICA,)

8 Plaintiff,)

9 vs.)

10 ALBERT LEON HARRIS,)

11 Defendant.)
_____)

2:05-cr-00332-RCJ-GWF

ORDER

12 Pending before the Court is Petitioner Albert Leon Harris's Motion to Vacate Under 28
13 U.S.C. § 2255 (ECF No. 142). The Court previously denied the motion, but the Court of
14 Appeals vacated and remanded so that Petitioner could have an additional opportunity to argue
15 that the motion was timely. The Court therefore solicited an additional brief from Petitioner,
16 giving him twenty-eight days from June 28, 2012 to file a brief arguing that his motion was
17 timely. Petitioner has failed to file a brief or request an extension as of today, July 27, 2012.
18 The Court therefore denies the motion.

19 **I. FACTS AND PROCEDURAL HISTORY**

20 A grand jury indicted Petitioner on August 24, 2005 for a single count of possession with
21 intent to distribute a controlled substance. (*See* Indictment, Aug. 24, 2005, ECF No. 1). The
22 Second Superseding Indictment ("SSI") included three counts of that offense and a fourth count
23 for possession of a firearm during and in relation to a drug crime. (*See* SSI, Oct. 10, 2007, ECF
24 No. 96). During the second day of trial, Defendant pled guilty to the first and fourth counts
25 pursuant to a plea agreement. (*See* Mins., Dec. 4, 2007, ECF No. 129). On March 3, 2008, the

1 Court sentenced Defendant to sixty (60) months imprisonment for each count, to run
2 consecutively, to be followed by five (5) years of supervised release for each count, to run
3 concurrently. (*See* J. 1–3, Mar. 3, 2008, ECF No. 136). Defendant did not appeal, and the
4 present motion is his first habeas corpus petition. Defendant brings four counts: (1) ineffective
5 assistance for failing to file a notice of appeal; (2)–(3) ineffective assistance during plea
6 negotiations; and (4) actual innocence.

7 **II. LEGAL STANDARDS**

8 **A. Untimely and Successive Habeas Corpus Petitions**

9 A federal habeas corpus petitioner must bring his petition within one year of the latest of:
10 (1) final judgment of conviction; (2) the removal of any impediment to bringing the petition
11 caused by unconstitutional government action; (3) the date on which the Supreme Court first
12 recognizes the right asserted, if the Supreme Court has made the right retroactively applicable to
13 collateral review; or (4) the date on which the facts supporting the claim or claims presented
14 could have been discovered through the exercise of due diligence. 28 U.S.C. § 2255(f).
15 Successive petitions must be approved by the Court of Appeals. *See id.* at § 2255(h).

16 **B. Waiver of Appeal Rights**

17 A criminal defendant who pleads guilty implicitly waives the right to challenge any pre-
18 conviction error, unless the alleged error relates directly to the voluntariness or intelligence of
19 the guilty plea itself:

20 When a criminal defendant has solemnly admitted in open court that he is in fact
21 guilty of the offense with which he is charged, he may not thereafter raise
22 independent claims relating to the deprivation of constitutional rights that occurred
prior to the entry of the guilty plea. He may only attack the voluntary and intelligent
character of the guilty plea

23 *Tollett v. Henderson*, 411 U.S. 258, 267 (1973). Furthermore, a defendant may explicitly waive
24 the right to appeal the sentence via plea agreement, so long as the waiver is voluntary and

1 intelligent. *United States v. Cope*, 527 F.3d 944, 949 (9th Cir. 2008).

2 **C. Procedural Default**

3 Even where the right to appeal an issue has not been waived, issues decided on direct
4 review, or which could have been raised on direct review but were not, cannot be brought in a
5 § 2255 petition. *Reed v. Farley*, 512 U.S. 339, 358 (1994). The former kinds of claim are res
6 judicata under ordinary claim preclusion principles, and the latter kinds of claim are said to be
7 “procedurally defaulted” and cannot be raised later in a collateral attack. *See id.* Procedural
8 default is excused where a defendant can show: (1) cause and prejudice; or (2) actual innocence.
9 *United States v. Ratigan*, 351 F.3d 957, 962 (9th Cir. 2003) (citing *Bousley v. United States*, 523
10 U.S. 613, 622 (1998)).

11 **1. Cause and Prejudice**

12 “Cause” means “some objective factor external to the defense” that impeded the
13 defendant’s efforts to comply with the procedural requirement. *McCleskey v. Zant*, 499 U.S. 467,
14 493 (1991). Among the reasons that can constitute “cause” are government coercion, *see United*
15 *States v. Wright*, 43 F.3d 491, 497–99 (10th Cir. 1994), ineffective assistance of counsel, *see*
16 *McCleskey*, 499 U.S. at 494, and a “reasonable unavailability of the factual or legal basis for the
17 claim,” *see id.* “Prejudice” means that “the constitutional errors raised in the petition actually
18 and substantially disadvantaged [a defendant’s] defense so that he was denied fundamental
19 fairness.” *Murray v. Carrier*, 477 U.S. 478, 494 (1986). A showing of prejudice requires
20 demonstration of a “reasonable probability that . . . the result of the proceedings would have
21 been different. A reasonable probability is a probability sufficient to undermine confidence in
22 the outcome.” *Vansickel v. White*, 166 F.3d 953, 958–59 (9th Cir. 1999) (quoting *Strickland v.*
23 *Washington*, 466 U.S. 668, 694 (1984)).

24 Ineffective assistance of counsel is “cause” excusing procedural default only where the

1 failure rises to the level of a constitutional violation under *Strickland*. *United States v. Skurdal*,
2 341 F.3d 921, 925–27 (9th Cir. 2003) (citing *Strickland*, 466 U.S. 668). Ineffective assistance of
3 counsel claims may be brought for the first time in a § 2255 petition, even if they could also have
4 been brought on direct appeal. *Massaro v. United States*, 538 U.S. 500, 504 (2003).

5 There is a “strong presumption” of reasonable professional conduct. *Strickland*, 466 U.S.
6 at 698. When this presumption is overcome and an attorney’s “unprofessional errors” are such
7 that there is a “reasonable probability” the result would have been different had the errors not
8 occurred, the defendant has been deprived of his Sixth Amendment rights. *Kimmelman v.*
9 *Morrison*, 477 U.S. 365, 375 (1986). “Reasonable probability” is a lower standard than “more
10 likely than not.” *Nix v. Whiteside*, 475 U.S. 157, 175 (1986). Counsel’s tactical decisions with
11 which a defendant disagrees do not rise to the level of ineffective assistance unless the decisions
12 are so poor as to meet the general test for constitutionally defective assistance. *See Dist.*
13 *Attorney’s Office for Third Judicial Dist. v. Osborne*, 129 S. Ct. 2308, 2330 (2009).

14 **2. Actual Innocence**

15 “To establish actual innocence for the purposes of habeas relief, a petitioner ‘must
16 demonstrate that, in light of all the evidence, it is more likely than not that no reasonable juror
17 would have convicted him.’” *Alaimalo v. United States*, 645 F.3d 1042, 1047 (9th Cir. 2011)
18 (quoting *Stephens v. Herrera*, 464 F.3d 895, 898 (9th Cir. 2006) (quoting *Bousley*, 523 U.S. at
19 623)). “A petitioner is actually innocent when he was convicted for conduct not prohibited by
20 law.” *Alaimalo*, 645 F.3d at 1047 (citing *Reyes-Requena v. United States*, 243 F.3d 893, 904 (5th
21 Cir. 2001)).

22 **D. § 2255 Habeas Corpus Motions**

23 A judge receiving a motion to vacate, set aside, or correct a sentence pursuant to 28
24 U.S.C. § 2255 “must promptly examine it.” Section 2255 R. 4(b). “If it plainly appears from the
25

1 motion, any attached exhibits, and the record of the prior proceedings that the moving party is
2 not entitled to relief, the judge *must* dismiss the motion” *Id.* (emphasis added); *United*
3 *States v. Matthews*, 833 F.2d 161, 164 (9th Cir. 1987) (citing *id.*). If not dismissed, the judge
4 must order the U.S. Attorney to respond within a fixed time. *Id.*

5 **III. ANALYSIS**

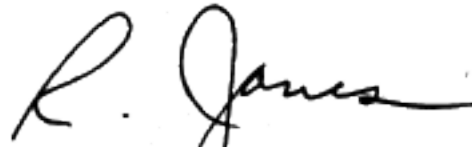
6 The Court originally denied the Petition because Petitioner filed the Petition more than
7 one year after the judgment of conviction became final, Petitioner alleged no unconstitutional
8 government action impeding his Petition¹ or any newly recognized, retroactively applicable
9 right, and Petitioner’s claims were all based upon information admittedly available to him more
10 than one year before he filed the Petition. Petitioner has failed to file a brief arguing that his
11 Petition is timely.

12 **CONCLUSION**

13 IT IS HEREBY ORDERED that the Motion to Vacate Under 28 U.S.C. § 2255 (ECF No.
14 142) is DENIED.

15 IT IS SO ORDERED.

16 Dated this 27th day of July, 2012.



18 ROBERT C. JONES
19 United States District Judge

20 ¹Petitioner appears to allege that his attorney’s failure to file a notice of appeal
21 unconstitutionally impeded his ability to bring his other claims on direct appeal. But Petitioner
22 waived his right to appeal pre-conviction error when he pled guilty, *see Tollett*, 411 U.S. at 267,
23 so counsel simply did not err by failing to file a notice of appeal. And even if the Court were
24 convinced that the guilty plea was made unintelligently—based on Petitioner’s claim today that
25 he did not in fact employ a firearm during the offense under the meaning of the
statute—Petitioner does not allege that his attorney’s errors or any other government action
impeded him from bringing his Petition within one year of final judgment.